

Waterway and Wetland Handbook

CHAPTER 80

BRIDGES

GUIDANCE PURPOSE AND DISCLAIMER

This document is intended solely as guidance, and does not contain any mandatory requirements except where requirements found in statute or administrative rule apply. This guidance does not establish or affect legal rights or obligations, and is not finally determinative of any of the issues addressed. This guidance cannot be relied upon and does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decision made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes, common law and administrative rules to the relevant facts.

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Authorizing the construction of bridges over navigable streams

PURPOSE

A fundamental principle in Wisconsin is that navigable waters are common highways and should remain forever free for public use. Various rules and statutes now regulate the construction of bridges over navigable streams. The regulations allow the Department to control the degree of obstruction in or over streams, to minimize their potential obstruction to flood flows, to minimize erosion, sedimentation and washout potential, and in some instances to ensure their structural adequacy.

MECHANISM

Permits, approvals, or a combination of permits and approvals are issued by the Department to authorize new bridge construction.

Section 30.10, Wis. Stats., requires approval of the Department prior to constructing a bridge over a navigable stream less than 35 feet wide. There is no mechanism for approving a clear span bridge over a portion of a lake which is less than 35 feet wide.

Section 30.12, Wis. Stats., requires a structure permit for any portion of a bridge which rests on the bed of a navigable lake or stream. Thus a bridge with center supports which crosses a stream less than 35 feet wide would require bridge approval and a structure permit.

Section 31.23, Wis. Stats., requires a permit for a bridge over navigable waters (a stream or portion of a lake) 35 feet or more in width. If any portion of the bridge rests on the bed of the waterway, a structure permit would also be required.

Section 30.12(4), Wis. Stats., specifies that highway and bridge activities including municipal projects conducted under the direction and supervision of the Department of Transportation are not subject to the prohibitions or permit or approval requirements of various statutes. Such activities must, however, be performed in accordance with inter-Departmental liaison procedures or the exemption does not apply (see the attached copy of the Cooperative Agreement between DOT and DNR dated 10-25-76).

Sections 30.10 and 30.123, Wis. Stats., exempt municipal highway bridges from permits or approvals under ss. 30.10, 30.12 or 31.23 (municipal nonhighway bridges would require appropriate permits). However, all municipal highway bridges shall be constructed according to the standards of Trans 207, Wis. Adm. Code, or the municipality is subject to enforcement action. Conceptual plans for municipal highway projects are to be submitted to the Department for evaluation and recommendations regarding clearance, flood flow capacity and erosion control. Permits or approvals under ss. 30.11, 30.195 or 30.20 would still be required if appropriate. Minor waterway modifications needed to construct a bridge do not require permits. Temporary roads, access roads or cofferdams needed for completion of the project would not require separate permits since they are considered to be necessary to complete the highway construction.

Section 30.122, Wis. Stats., provides that structures constructed prior to December 9, 1977, which did not require a permit at the time, are presumed to be in conformity with the law. This statute does apply to bridge crossings since the department and its predecessor agencies for many years considered that these crossings required no permit or approval authority unless they crossed navigable waters at least 35 feet wide, in which case a bridge permit was required. This practice continued until a 1974 Bureau of Legal Services opinion advised that a bridge over a stream which did not require a permit required plan approval in order to comply with s. 30.10, Wis. Stats. This status (s. 30.122) does not legalize older bridge crossings. If a bridge should prove to be an obstruction to navigation, enforcement action pursuant to s. 30.15, can be initiated.

HISTORY

The history of regulation and control of bridges over navigable streams is not entirely clear. A considerable research effort would be required to dot the i's and cross the t's. The initial prohibition of obstructions, including bridges, in or over rivers or streams was adopted by the Territorial Legislature of 1841 (Act No. 9) and remains nearly unchanged today as s. 30.10(2), Wis. Stats. Chapter 72, Laws of 1853, amended the act by adding "...provided that nothing herein contained shall be construed so as to affect any act now in force granting towns or county boards of supervisors the power to erect or authorize the construction of bridges across such streams. "

Despite this apparent exemption, the legislature adopted session laws specifically to authorize municipal highway bridges until 1917. From 1917 to 1974 the Department and its predecessor agencies apparently did not require municipalities to receive permits or approvals explicitly for highway bridges or culverts, although orders were issued pursuant to s. 31.25, Wis. Stats., to abate bridges or culverts which were an obstruction to navigation. In 1974 and 1975 the Department did require municipalities to secure permits for bridge construction as a result of a circuit court decision (Public Intervenor v. Department of Natural Resources and Eau Claire County Highway Department). A subsequent Attorney General's Opinion (OAG-34-75), which the Department was obliged to follow, stated that municipalities were exempt from permit requirements. In 1976, Chapter NR 320, Wis. Adm. Code, "Regulation of Bridges in or Over Navigable Waterways" was adopted by the Department in part to codify the law relating to municipal bridges. In 1977, s. 30.10(4) was modified and ss. 30.123 and 84.01(23), were added to clarify the fact that municipal highway bridges did not need permits but that they had to be constructed in accordance with standards developed by the Department of Transportation in consultation with the

Department. On July 1, 1981, Chapter Trans 207, Wis. Adm. Code, containing design and construction standards for municipal highway bridges, became effective.

Chapter 38, Laws of 1853, appears to be the first general law relating to the construction of railroads. Essentially the same language appears today in ss. 190.02(5) and 190.08, Wis. Stats. This law granted railroad corporations the power to construct their railroad on or over a stream or watercourse provided that they restored the waterway to its former state or to such condition that its usefulness would not be materially impaired.

Chapter 454, Laws of 1907, required railroad corporations to receive a certificate "that public convenience and a necessity require the construction of the railroad." The Railroad Commission (established by Chapter 362, Laws of 1905) held hearings on applications and decided whether or not such a certificate should be issued. If railroad corporations received the required certificate they were then required to submit plans for railroad grades and bridges to the Railroad Commission for approval. The Railroad Commission was charged with examining the plans, suggesting modifications of the plans if necessary for public safety and authorizing the construction of the railroad. Upon completion of the railroad construction the commission inspected the project, and if it was properly constructed in accordance with the plans the commission issued an order authorizing operation of the railroad. Presumably, these reviews addressed the general requirement that streams be restored to their former usefulness upon completion of the railroad construction. Essentially the same procedure is required today except that these responsibilities have been delegated to the Transportation Commission of the Department of Transportation (Chapter 29, Laws of 1977). Prior to 1977 these duties were handled by the Public Service Commission.

Although the Railroad Commission apparently had been delegated authority to approve railroad bridges, the Legislature adopted session laws specifically to authorize them until 1917.

The legislature created laws allowing permits to be issued for structures, such as culverts (Chapter 335, Laws of 1949) and certain bridges (Chapter 331, Laws of 1941), but application of those laws to railroad bridges was unsettled. On January 5, 1973, in a legal opinion to the water regulation section, the Bureau of Legal Services opined that railroad corporations were not exempt from permit requirements. Since that time the Department has required railroad corporations to apply for permits for the construction or replacement of bridges and culverts.

As in the case of municipal highway bridges and railroad bridges, the legislature authorized many private bridges through various session laws at least up to 1917. Until the laws allowing permits to be issued for bridges and culverts were passed, private bridges were generally allowed on the theory that a riparian owner had a common law right to construct and make a reasonable use of a structure provided that the stream was not so obstructed as to materially impair its usefulness for the purpose of navigation. In other words, an obstruction in navigable stream which did not impair free navigation, although not authorized by law, was not considered a nuisance and unlawful. This basic philosophy was followed by the Railroad Commission, Public Service Commission and the Department until 1974, except in the case of bridges requiring a permit user ss. 30.12 or 31.23, Wis. Stats. In 1974 the Department began requiring and issuing a formal approval for clear span bridges to grant "the permission of the state" expressed in s. 30.10.

The history of private bridge regulation was further complicated by an internal policy regarding culverts. Culverts which occupied the entire bed of a stream or even culverts with fill which crossed a stream less than 35 feet wide were considered bridges rather than structures and no formal authority was required. Since 1974 such crossings have been considered structures under s. 30.12 Wis. Stats., and a permit has been required. (See Chapter 85, Culvert Waterway Crossings.)

Even though many "bridges" were constructed in apparent violation of the statutes until either 1941 or 1974, the Department and its predecessor agencies usually took enforcement action only on bridges which were believed to obstruct navigation. In most instances the owners were simply ordered to provide a larger bridge or increase navigational clearance.

STANDARDS

Statutory Standards

1. Approvals. In s. 30.10 (2), Wis. Stats., no specific standards are mentioned although a bridge is clearly described as an obstruction which may be constructed over a stream only with the permission of the state. Bridge approvals are not required and should not be issued for clear span bridges crossing a portion of a lake less than 35 feet wide. Control over these types of bridges would be of an advisory nature to prevent obstructions to navigation or enforcement actions under ss. 30.15(1)(a) or 31.23(1).
2. Structure Permit. Sec. 30.12(2)(a), Wis. Stats., contains standards which require that structures:
 - a. do not materially obstruct navigation;
 - b. do not reduce the effective flood flow capacity of a stream;
 - c. will not be detrimental to the public interest.

In addition, permits may only be granted to a riparian owner (or lessee) to build or maintain a structure for the owners' use. The fact that municipal highways (bridges) were for public use and not for the municipality's "own use" was a determinative factor in the attorney general's opinion that municipalities were exempt from permit requirements.

3. Bridge Permit. Section 31.23, Wis. Stats., requires:
 - a. a permit for construction of a bridge over navigable water 35 feet or more in width (between ordinary high-water marks). For a stream, the regulatory width should be considered the average width of the particular "reach" of stream in question;
 - b. that the bridge must not impair the rights of the public for purposes of navigation or fishing;
 - c. "every such bridge used by the public shall at all times be maintained in a safe condition..."

A bureau of Legal Services Opinion issued 7-778 has interpreted s. 31.23(3)(d), Wis. Stats., to mean that bridges which require a permit must be evaluated for structural adequacy. Such an evaluation is not required for bridges approved pursuant to s. 30.10, although bridges with obvious deficiencies should not be approved.

4. Permit Exemption. Section 30.123, Wis. Stats., exempts municipalities from certain permits for construction or reconstruction of highway bridges. The definition of "municipal highway bridge" contained in Chapter NR 320.03(6) should be applied. Note that pedestrian or vehicular bridges for nonhighway purposes are not excluded from permit requirements.

ADMINISTRATIVE CODE STANDARDS

1. Wetlands. NR 1.95, Wis. Adm. Code, establishes general standards to be applied by the Department in decisions affecting wetlands. The Department presumes that wetlands are not to be adversely impacted or destroyed. NR 1.95 further specifies the balancing test to be used by the Department when determining the potential adverse effects of a project on a wetland versus the benefit to the applicant.

2. Shoreland areas. NR 115, Wis. Adm. Code, establishes administrative standards to be followed by counties in their administration of shoreland zoning ordinances. These standards should be reflected in approving bridges.
3. Floodplain areas. NR 116, Wis. Adm. Code, establishes administrative standards to be followed by local units of government in their administration of floodplain zoning ordinances. Permits should require applicants to conform with standards established in NR 116.
4. Environmental impact. NR 150, Wis. Adm. Code, establishes procedures for determining whether a given project requires an Environmental Impact Statement (EIS). Bridges are Type III actions which do not normally require an environment assessment.
5. Bridges. NR 320, Wis. Adm. Code, establishes clearance requirements, flood flow requirements and plan and information requirements for permits or approvals.
6. Municipal Highway Bridges. Trans 207, Wis. Adm. Code, establishes design and construction requirements for municipal highway bridges and a Department review procedure to be initiated by municipalities. (Municipal highway bridges constructed under the direction or supervision of DOT are to be evaluated in accordance with the DOT Liaison Agreement.)

ADMINISTRATIVE INTERPRETATIONS:

1. Railroad Bridges. Bureau of Legal Services opinions (1-5-73, 1-18-79 and 7-25-79). Railroad corporations are not exempt from bridge or structure permit requirements. According to S. 190.08, Wis. Stats., upon abandonment of a railroad, watercourses shall be restored to their former state or to such conditions that their usefulness shall not be materially impaired.
2. Approval of Bridges. Bureau of Legal Services opinion (10-274). Private bridges over streams less than 35 feet wide need plan approval to grant the permission of the state as required by s. 30. 10, Wis. Stats.
3. Temporary Bridges. Bureau of Legal Services opinion (1-10-75). Temporary bridges require permits or approvals where appropriate.
4. Enforcement Authority over Municipal Bridges. Bureau of Legal Services opinion (3-24-78). The Department may take enforcement action against municipalities who fail to construct highway bridges or culverts in accordance with the standards of Trans 207, Wis. Adm. Code.
5. Structural Adequacy of Bridges. Bureau of Legal Services opinion (7-7-78). Bridges permitted under s. 31.23, Wis. Stats., must be reviewed for structural adequacy whereas this evaluation is not required for other bridges.
6. County Forest Road Crossings. Bureau of Water Regulation and Zoning (WRZ) program guidance (210-82). If the forest road is a public highway Trans 207, Wis. Adm. Code, procedures should be followed.
7. Department Responsibilities under Trans 207, Wis. Adm. Code. Division Administrator program guidance (9-11-81). This is an eight page guidance and should be referred to directly (copy attached).
8. Program Guidance, Trans 207, Wis. Adm. Code. Bureau of WRZ guidance (3-16-82). This is a four page guidance and should be referred to directly (copy attached).

PROCESS

Application:

In order to perform the required technical reviews, applications must contain sufficient information (see discussion under design considerations). Because a structural evaluation must be performed for a private bridge that requires a permit pursuant to s. 31.23, Wis. Stats., and hydraulic analysis may be required, it is highly desirable that the plans be prepared by an engineer.

If the proposed bridge utilizes center supports, piers or abutments on the bed of the waterway, the standards of S. 30.12, Wis. Stats., come into play and must be addressed in the permit processing and field investigation.

Plans for construction procedures and devices (cofferdams, etc.) should be submitted with the application so authority for them can be incorporated in the permit.

Field Investigation:

The field investigation is undertaken to evaluate the environmental and physical effects of the proposal and to evaluate and verify other data supplied by the applicant such as soil type, floodplain cross-sectional data, fill requirements, etc. (see discussion under design considerations). It is desirable to complete the field investigation prior to issuing a public notice. This procedure would allow the Department to determine its position prior to the expiration of the notice period in the event that the Department wishes to request a hearing.

Notice Requirements:

A public notice is required for any private bridge crossing navigable waters having a width of 35 feet or more. Notice is also required for bridges regulated under s. 30.12, Wis. Stats. An exception to this requirement might be when department personnel are clearly in opposition, due to nonconformance with statutory standards, in which case a notice of public hearing could be issued since s. 31.06, Wis. Stats., allows this option. In some cases where it is recognized that a hearing will be required it may be desirable to issue a notice of proposal to solicit public opinions, particularly when the project is suspected to be highly controversial.

Design Considerations

1. Culverts vs. Bridges

Generally, the majority of private stream crossings use culverts; however, there are many instances when bridges are highly desirable and may be the only feasible method for crossing a stream.

Bridges offer several advantages over culverts including less disturbance of normal flow patterns. The use of culverts often results in increased flow velocities. Such increases could serve to inhibit fish movement and increase erosion downstream. While the use of a bridge usually minimizes this problem, it should also be recognized that it may be a more costly alternative. The investigator should be cautioned that the advantages of a bridge over a culvert(s) should be determined on a case-by-case basis.

2. Hydraulic Review

Chapter NR 320, Wis. Adm. Code, specifies which bridges will need detailed hydraulic review and which will not. Briefly, any private clear span bridge that uses approach fills less than 1 foot high and 15 feet long does not require a hydraulic review. Any bridge which requires piers or more fill than cited above

requires a hydraulic review. The word ramp as used in the code means approach fill. Use of an open structural approach ramp regardless of length and height generally does not require hydraulic review.

If hydraulic calculations are required, an application should contain:

- a) A location map of sufficient detail to allow field staff to easily locate the project site.
- b) Plan view of project showing:
 - 1. Property lines
 - 2. Location of waterway
 - 3. Existing buildings, roads or bridges
 - 4. Location of bridge and roadway
- c) Detailed plans of the bridge and road fill
 - 1. Skew of the bridge - the angle between the direction of the stream flow and a line perpendicular to the bridge center line.
 - 2. Description of the abutments -
 - a. angle of the wingwalls
 - b. materials to be used
 - c. distance between abutments at the base and at the top
 - d. elevations of the base and top of the abutment
 - 3. Elevations of supporting beams and/or trusses
 - 4. Road grade (entire fill plus bridge deck elevation)
 - 5. Normal high water elevation
- d) Floodplain cross section

A floodplain cross section is required to conduct a hydraulic analysis for a bridge crossing. The cross section must extend to an elevation above the regional floodplain. The cross section should be representative of the floodplain in the vicinity of the bridge. If a natural or man-made constriction exists either upstream or downstream of the crossing site, an additional cross section should be provided at the constriction. If the constriction is a bridge or culvert, a road profile and structure dimensions and elevations should be submitted. A constriction upstream may cause flood elevations higher than the proposed crossing thereby minimizing any adverse backwater effects. A constriction downstream may affect the flood elevation at the proposed crossing.

- e) Other information necessary to complete hydraulic review include:
 - 1. Stream slope. Elevations of the water surface 1,000 feet upstream and 1,000 feet downstream as well as at any intervening changes in water surface profile.
 - 2. Photographs of floodplain cross section(s). Photographs are necessary to accurately estimate channel and overbank roughness factors.

NOTE: It is highly desirable that stream slopes and floodplain cross section(s) be surveyed by an engineer, surveyor or government technician in order to accurately analyze a project.

3. Structural Review

The department must certify the structural stability of private bridges which cross navigable waters 35 feet or more in width. This structural certification puts a degree of liability on the department, therefore, the bridge application must be complete.

NOTE: Bridges approved under s. 30. 10, Wis. Stats., do not require structural evaluation; however, a bridge which is obviously deficient should not be approved without modification.

The following information may be required:

- A. Soil borings
 - 1. at abutments
 - 2. channel
- B. Abutment details
 - 1. concrete
 - a. reinforcing location and size
 - b. footing details
 - 2. piles
 - a. depth piles will be driven
 - b. dimensions of piles
 - c. description of materials
 - 3. wood cribs
 - a. dimensions of materials
 - b. construction details
 - c. type and treatment of wood
- C. Deck details
 - 1. location and dimension of beams
 - 2. dimension of decking material
 - 3. description of materials
- D. Anticipated usage
 - 1. average load
 - 2. maximum load
- E. Joint details
 - 1. pier caps
 - 2. sill plates
 - 3. splice plates
 - 4. types of connections including size of connectors

FINAL DISPOSITION

Bridge approvals (or denials) are issued by letter. A bridge which also includes a structure on the bed of the waterway or which crosses a waterway over 35 feet wide must receive a permit. Permits under ss. 30.12 or 31.23, Wis. Stats., can only be denied by a hearing examiner.

Any person objecting to the decision issuing or denying a permit or approval may seek judicial review by serving and filing a petition in accordance with the provisions of sections 227.15 and 227.16, Wis. Stats., within thirty (30) days of the decision date.

MONITORING

Permits or approvals should require the applicant to notify the Department five days before starting work and within five days of completion of the work. There should be a follow-up inspection to determine whether the work was done in accordance with the approved plans. Enforcement actions should be considered if the work deviates significantly from the plans.

EMERGENCY PROCEDURES

On occasion existing bridges may sustain damage or fail due to flooding or accidents. If the bridge is authorized or "presumed in conformity with the law" we should allow repair or reconstruction without invoking permit requirements. Generally if a bridge needs to be replaced we should require the replacement to be of at least equal hydraulic capacity.

ENFORCEMENT

A bridge in violation of s. 30.10(2), Wis. Stats., may be prosecuted pursuant to ss. 30.15(l)(A), 31.23(l) Or 31.25, Wis. Stats. A bridge which crosses a portion of a lake less than 35 feet wide may be prosecuted pursuant to ss. 30.15(l)(a) or 31.23(l), Wis. Stats. A bridge in violation of s. 30.12, Wis. Stats., may be prosecuted pursuant to ss. 30.12(3) or 30.15, Wis. Stats, in addition to any section which applies to bridges.

Educational Materials

Pamphlets "Wisconsin's Water Regulation Programs Work for You"; "Public or Private? I--Navigability"; and "Public or Private? II--The Ordinary High Water Mark."

2823H

Procedure
E-D-3800

Manual
DESIGN
Subject AGENCY LIAISON (STATE)
Department of Natural Resources

Cooperative Agreement
Appendix A Agreement
Between DOT & DNR

Department of Natural Resources
INTRA-DEPARTMENT
MEMORANDUM

DATE: October 25, 1976 IN REPLY REFER TO: 1440

TO: District Directors

FROM: Anthony S. Earl

Re: Cooperative Agreement between Wisconsin Department Transportation and
Department of Natural Resources

Attached for immediate use is a copy of the subject agreement recently signed by the Department of Transportation and by our department. This was worked out through the combined efforts of the two departments for the purpose of formally approving previously established understandings and cooperative work efforts.

Please see that all members of your staffs receive the information contained in this agreement so that these procedures may be followed throughout the state by all DNR personnel.

I feel confident everyone in our department will continue to exercise full cooperation with the Department of Transportation in the manner indicated by this agreement. We are sure this joint effort will be observed by DOT as is shown by their wholehearted cooperation in accomplishing the "Cooperative Agreement."

Should you have any comments or suggestions, please feel free to contact us.

Anthony S. Earl
Secretary

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Number E-D-3800

Manual
DESIGN

AGENCY LIAISON (STATE)
Department of Natural Resources
Cooperative Agreement

Originator
CHIEF OF FACILITIES
DEVELOPMENT

Attached as appendix A to this Procedure is a recently executed cooperative agreement entitled Cooperative Agreement between Wisconsin Department of Transportation and Department of Natural Resources.

This agreement is intended to be a formal declaration of how the two departments will continue to coordinate and cooperate without DOT obtaining permits for work in/over navigable waters. It basically constitutes a formalized statement of previously established understandings and cooperative work efforts.

The primary benefit of this agreement will be its use as a uniform statement of policy. It has been sent to the DNR District Offices for the purpose of insuring that the associated procedures are followed throughout the state by all DNR Personnel.

Although a basic premise of this agreement is that DOT is not required to obtain permits from DNR under State Statutes, it is also emphatic that project development will give full consideration to the spirit and intent of pertinent laws to insure that projects are developed in the total public interest. It is expected on the part of both departments that full and mutual cooperation will be forthcoming in carrying out the principals of this agreement as was exemplified in the cooperative work effort in its formulation.

Number E-D-3800

Manual
Design

Subject

AGENCY LIAISON (STATE)
Department of Natural Resources
Cooperative Agreement

Originator
CHIEF OF FACILITIES
DEVELOPMENT

COOPERATIVE AGREEMENT
BETWEEN
WISCONSIN DEPARTMENT OF TRANSPORTATION
AND
DEPARTMENT OF NATURAL RESOURCES

I. Statement of Purposes

The Wisconsin Department of Transportation (DOT) and the Department of Natural Resources (DNR) recognize that the Wisconsin Legislature has charged DNR with the responsibility for protecting the State's land, water, fish and wildlife resources; and has charged DOT with furnishing the citizens of Wisconsin with an adequate, safe and economical transportation system. The DOT and DNR further recognize that the construction, reconstruction, maintenance and repair of transportation facilities, including highways and bridges, may have potentially adverse effects on the environment.

Therefore, the DOT and DNR agree that in the interest of fulfilling their respective duties, and to provide a reasonable and economical procedure for carrying them out in a manner that is in the total public interest, the DOT and DNR will consult and cooperate with each other such that each can accomplish its assigned statutory responsibilities while assuring at the same time adverse effects on Wisconsin's land, water, fish, and wildlife resources are minimized to the fullest extent practicable under the legislative mandates.

II. General Liaison, DOT Project Development Activities

Liaison between the departments on projects under consideration for development by DOT will be guided by the following:

- A. DOT will provide DNR with copies of notices of intention to make changes in the State Trunk Highway System, notices of hearings scheduled for proposed changes, copies of annual proposed highway improvement programs, and copies of Federal and State Environmental Impact Statements. Other notices and documentation will be provided upon request.
- B. DOT will inform DNR of proposed new construction by providing copies of pertinent inter-departmental memoranda and preliminary plans indicating location and nature of work,

immediately following authorization to incur engineering expenditures, to insure that DNR has this data at the earliest possible date.

- C. DNR will review proposed improvements and make the recommendations necessary to comply with applicable environmental and regulatory requirements. DNR, in making its review and recommendations, will recognize that it is the policy of the state to provide a safe and economic transportation system with a minimal environmental impact.
- D. DOT will give consideration to such DNR recommendations incident to the location, design, construction and maintenance of facilities. If DOT feels that it is not practical to comply with the DNR recommendations, appropriate Department staffs will meet and resolve any differences. In such considerations, both Departments will keep in mind the total needs of the public as well as the specific needs that each is mandated to administer.
- E. DNR and DOT district offices and central offices will maintain close liaison to achieve the objectives of this agreement.
- F. DOT will monitor the activities of the Contractor to assure that the environmental and regulatory requirements for the project are being met.

III. DNR Projects

On those projects contemplated by DNR which will result in special land-use restrictions such as presently found in the Federal Land and Water Conservation Act (LAWCON) and the 1966 Federal DOT Act (Section 4(f)), DNR will inform DOT of such restrictions, if known, prior to committing action so that measures to provide for needed transportation corridors can be taken as much as is practical.

IV. Mutual Concurrence on Actions

- A. It is the intent of this agreement that joint review of projects will result in concurrence on the proper course of action to comply with the statutory obligations of which agency.
- B. Actions by contractors - DOT usually implements its actions by letting contracts to the lowest qualified bidder. In these contracts the final product is usually specified in great detail, but the method of operations is left to the contractors discretion. The climate of competitive bidding and relatively free choice of methods stimulates creativity and results in lower costs of the public. The contractors methods, however, are not specifically a part of the liaison and coordination described under 11 because the contractor is not known until the very last stages of action.

To insure that environmental regulations are complied with in all applicable areas, such as stream crossings and wetland encroachments, DOT will require contractors to submit a plan of operation for review and approval by DOT. Further liaison with DNR will be necessary if the construction methods proposed in the operation plan have not been reviewed and concurred in by DNR during previous liaison on the project. Evidence of approval will be kept in the DOT engineers field office with a copy sent to the appropriate DNR district office. A contractor's operation which has been approved under this procedure shall be treated by DNR as an action by DOT.

- C. Projects administered by Division of Highways for other governmental units - DOT frequently administers transportation projects for counties, municipalities, and other local governing units as part of its statutory responsibilities. Those projects on which DOT exercises administrative control of plan preparation and contract supervision will be considered by DNR to be actions by DOT itself.

V. Structures Over and In Waterways

- A. Consistent with the above concepts DOT recognizes that DNR has developed criteria specified in Administrative Codes NR 116 and NR 320 concerning flood plain encroachments, stream profiles, and navigational clearances. DOT concurs with the spirit and intent of these Codes and will provide DNR and affected local units of government with information indicating the criteria used in the design and placement of structures in relation to the regional flood. DOT will cooperate fully with local units of government on their effort to minimize flooding effects and meet their responsibilities in flood plain zoning.

DOT considers discharge capacities, backwater elevations, potential upstream and downstream water damages, and protection of the roadway in the design of any water-related structure. It also considers the property rights of present and future riparian owners, upstream and downstream, consistent with the constitutional principle of just compensation.

- B. Construction in areas having a potential for flooding associated with a defined stream channel DOT shall compute the 100 year regional flood discharge and elevations as defined in NR 116 and NR 320. In determining structure size and placement, DOT will consider flood plain management standards pursuant to NR 116 and relevant local ordinances. Upon completion of the design, predicted water surface elevations and calculations will be made available to the applicable zoning authorities and DNR for their use.
- C. Construction in areas having a potential for flooding but not associated with a defined stream channel - In determining structure size and placement for these areas DOT will maintain consistency with the above concepts in A and B except that the 100-year flood elevations and zoning considerations will only be made when they appear relevant to the spirit and intent of NR 116.
- D. Replacement Structures - DOT will normally consider replacement structures in relation to 100-year flood elevations, as they may occur with such existing structures in place. In these cases, however, DOT will also compute 100-year water elevations under natural stream conditions and may design the new structure to accommodate the natural condition if it appears to be in the public interest. Pertinent elevations will be made available to affected local units of government and DNR as discussed under A to C above.

VI. Maintenance and Removal of Existing Structures

It is mutually recognized that DOT has the authority and responsibility to preserve the integrity of public-funded highways by means of a sound maintenance program. Also, the creation of a new highway often includes the removal of existing structures or roadbeds which are unusable or obsolete.

On normal planned highway maintenance and structure removal DOT will maintain liaison with the DNR district Office in the same manner as is set forth earlier in this agreement for

construction projects. It is recognized that emergency maintenance activities necessitate expedited liaison procedures. In emergency maintenance situations DOT will contact the DNR District Office and furnish details on the project. However, the degree of notice furnished to DNR in emergency situations will be in direct correlation to the severity of the emergency. All efforts will be made by DOT to give as lengthy a notice as is possible. In emergency maintenance situations DNR will submit its recommendations on the project o DOT on an expedited basis.

DOT will maintain close liaison with DNR, as discussed throughout this agreement, to insure that the use of explosives does not result in damage to waterways, wetlands, and other environmentally sensitive areas nor result in the destruction of fish or game.

Wisconsin Department of Natural Resources
Anthony S. Earl, Secretary

Date: 21 Oct. 1976

Wisconsin Highway Commission
John W. Fuller, Secretary

Date: 12 Oct. 1976

Zel S. Rice II, Secretary

Date: 11 Oct. 1976

CORRESPONDENCE/ MEMORANDUM**STATE OF WISCONSIN**

DATE: September 11, 1981

FILE REF: 3500

TO: District Directors

FROM: George E. Meyer - ADM/5

SUBJECT: Department Responsibilities Under Chapter Trans 207, Wisconsin Administrative Code

As you know, Chapter Trans 207, Wisconsin Administrative Code, (the municipal bridge standards) became effective with its publication on July 1, 1981. At this time, a lawsuit has been filed by the Public Intervenor and Trout Unlimited challenging the constitutionality of the rule on the basis of excessive delegation of authority from the state to local units of government. Nevertheless, in the absence of a restraining order or injunction preventing our use of the rule, we will continue to administer it as required.

Copies of the rule have been sent to all Districts and the Bureaus of Law Enforcement and Water Regulation and Zoning. I recommend that you distribute copies to law enforcement and fish management personnel and to District and Area Water Regulation and Zoning staff. Local highway officials should obtain copies through the appropriate organization (County Board Assoc., League of Municipalities, etc.). Requests for additional copies of the rule for Department staff or for citizens should be forwarded to the Bureau of Water Regulation and Zoning. The following is a discussion of key requirements in the rule and our responsibilities to administer and enforce it.

1. Introduction: Chapter Trans 207 is an unusual rule in that it was adopted by one state agency (the Department of Transportation) and will be administered almost exclusively by another state agency (the Department of Natural Resources). The rule was adopted in this manner because of the requirements contained in sections 30.123 and 84.01(23), Statutes, which were created by Chapter 190, Laws of 1977. While this arrangement appears awkward at first, I believe that we will find it is workable once we gain some experience with it. Most importantly the rule does enable Department field staff, through diligence, to protect against significant adverse impacts on fish and game habitat, wetlands and public navigation.
2. Coverage: Trans 207 applies to all bridges, arches, and culverts constructed in and over navigable streams by counties, towns cities, and villages, where the construction is under the control of the municipality and does not utilize state or federal aids. The rule does not apply to projects of the Department of Transportation or to those local projects which are funded and administered through DOT. Such projects are, as you know, covered under the interagency liaison agreement and are dealt with according to section 30.12(4), Statutes.

We will apply the requirements of Trans 207 to municipal bridge projects which (1) were not under construction on July 1, 1981, or (2) which were not planned prior to July 1, 1981, for completion after that date. This means that we will apply Trans 207 only to projects which are planned and constructed after July 1, 1981.

Section 30.123, Statutes (not Trans 207) exempts municipalities from permit requirements for bridges under sections 30.10, 30.12, and 31.23. Section 30.19, as you know, already contains an exemption for the construction or repair of public highways. Therefore, municipal bridge construction is still subject to the requirements of sections 30.11, 30.195,

and 30.20, Statutes. It is unlikely that the provisions of any portion of Chapter 31 other than section 31.23 would be applicable to municipal bridges.

It is also important to recognize that the statutory exemption from permit requirements and associated requirements to follow Trans 207 only apply to the construction of bridges, arches, and culverts over navigable streams. This means that the construction of roadways not associated with bridges, arches, or culverts, and the construction of bridges, arches, culverts or causeways over lakes and flowages are not exempt from any of the Chapter 30 - 31 permit requirements. The key factor differentiating between crossings of "lakes" and "streams" is whether the crossing is installed in an area of still water (lake or flowage) or moving water (stream).

As far as road embankments and fills are concerned, the rule applies to these features within the 100-year floodplain if they are associated with an actual crossing of a stream. The rule does not apply in other situations.

We would not consider a roadway along the edge of a body of water to be a crossing within the meaning of Trans 207. Such a roadway would require Chapter 30 permits or approvals if it extended onto the bed of the waterway.

3. Procedures: The processing of requests for review of municipal bridges should be handled by the same staff that are now involved in the review of Department of Transportation bridge projects. Procedures are presently included in Manual Code 1621.2; a revision of M.C. 1621.2 will be initiated soon. With this in mind, the following specific comments are made on procedural requirements:
 - a. A municipality may ask for information regarding resource concerns and jurisdictional limits at any time. While we would certainly encourage such requests before initial plans are developed, we should consider the submittal of a conceptual plan as a formal request by the municipality for our comments in these areas.
 - b. The rule provides for the development and submittal to the Department of a "conceptual plan" by the municipality. In the case of "minor replacements" (these will be most of the small culvert replacement projects), the conceptual plan need only contain enough information to demonstrate that the project meets the definition of minor replacement in the rule. This information should prove adequate for us to make necessary evaluations. For other projects, the conceptual plan requirements are more stringent and may require a technical review by engineers in the Bureau of Water Regulation and Zoning. The rule allows the Department to waive any or all of the conceptual plan requirements if adequate earlier coordination with the municipality has taken place.
 - c. Once a conceptual plan has been submitted to the Department, we have thirty days (with a possibility of a ten day extension) in which to review the plan. We should consider that the time period only begins when we have determined that the conceptual plan is adequate. If we receive a conceptual plan that does not meet the requirements of Trans 207, we should notify the municipality of the additional information requirements and of our determination that the review period has not yet begun. If a field inspection is made (I encourage these for projects other than minor replacements), the results of that inspection should be documented on the field investigation report (form 3500-23).

- d. For projects other than minor replacements, the municipality is required to issue a Class I legal notice describing the proposed project. The rule, however, does not provide for a public hearing as a result of that notice. Therefore, citizens will only have the opportunity for a hearing provided under other statutes and cannot rely on Trans 207 in that way.
- e. We will transmit our comments on each conceptual plan to the municipality. If we have no comments, we should still advise the municipality of this. We may receive requests from citizens to hold a contested case hearing under s. 227.064 on a proposed bridge. Because our review and comment is not a formal decision and because the municipality may simply proceed to construct based on our comments, the s. 227.064 hearing approach is not appropriate for municipal bridge projects. The Legislature, by eliminating most permit requirements for these bridges, has made it clear that our usual process, including public involvement, does not apply under Trans 207. Individuals wishing to contest these projects should initiate a civil action against the municipality or join in any enforcement action begun by the Department.
- f. Record of notifications: Trans 207 requires that the Department maintain records of all notifications received. This would include early coordination which resolves issues regarding a proposed bridge crossing, the submittal of conceptual plans by the municipality, and any legal notice issued by a municipality (this is required for most projects other than minor replacements). We are required to maintain this list and to make it available to the public on request. Attached, for your use, is a sample log form which could be photocopied on a monthly basis and mailed to individuals requesting notification. Trans 207 does not require us to send other types of material to the public on request and our normal procedures relating to public records requests would apply in those situations. The Bureau of Water Regulation and Zoning will be auditing these notifications on an annual basis in order to evaluate municipal compliance with Trans 207. Your records are vital to help ensure this compliance with the law.
- g. Enforcement: The Department has authority under a variety of statutes to seek enforcement of violations of Trans 207 and the underlying statutes. Any violation of Trans 207 itself is ultimately a violation of section 30.123, Statutes and, therefore, can be prosecuted under section 30.03. In addition, we continue to have enforcement authority under section 30.15, Statutes, to seek abatement of obstructions to navigation. Unnecessary siltation or pollution from municipal bridge construction could be enforced in the same manner as other sources of siltation, probably through subsection 29.29(3), Statutes. An additional type of "enforcement" which is available is the requirement of section 81.38(5), Statutes, that bridges conform to the standards of Trans 207 or else county cost sharing aids will not be available. While this is not an enforcement device as such, it does provide an incentive for the local officials (primarily town officials) to comply with the requirements.

We may have to make extensive use of section 30.03 in following up on violations of Trans 207 because of local prosecutorial resistance. A brief listing of requirements which municipalities must comply with under the rule follows later in this memorandum.

While we would probably not be directly involved, many violations of Trans 207 would also be Section 10 or Section 404 violations and we should seek enforcement

by the Corps of Engineers where significant resource damage could occur.

- h. **Emergencies:** Earlier versions of Trans 207 contained specific language allowing municipalities to proceed with reconstruction during emergencies and to provide notification after the fact to the Department. The published version of the rule does not contain such an emergency provision. However, we should be mindful of the obligations of municipal authorities to maintain an adequate transportation system and should make every reasonable effort to accommodate their needs when unforeseen damage to bridges creates unsafe conditions. Most of these situations would probably be minor replacements and we should be able to expedite the review in these cases.
 - i. **Environmental Impact Requirements:** Department actions under Trans 207 are not specifically listed in Chapter NR 150, Wisconsin Administrative Code. However, since private bridge and culvert construction is a Type III action (see NR 150.03(3)(d)17), we should likewise consider our actions under Trans 207 to be Type III.
 - j. **Water Quality Certification:** Municipal highway projects are not exempt from water quality certification or from Chapter NR 299, Wisconsin Administrative Code. Because there is no requirement for a formal public notice by the Department under Trans 207, we will not ordinarily issue a public notice on our intention to waive or grant water quality certification. Instead, the appropriate wording from Chapter NR 299 will be inserted into the Corps of Engineers section 404 permit notice. In cases where we intend to deny water quality certification, we will issue the required public notice under Chapter NR 299.
 - k. **Department Wetland Policy (Section NR 1.95, Wisconsin Administrative Code):** Because Chapter Trans 207 gives us a wide variety of environmental concerns which can be used to influence the manner in which municipal bridges will be constructed, we can use the concepts of section NR 1.95 in our dealings with municipalities. However, because we will usually have no direct permit authority over the municipalities, it is uncertain whether NR 1.95 could be used as the basis of legal action against a municipality that chooses to proceed contrary to our recommendations. Field staff should consult the Bureau of Water Regulation and Zoning and the Bureau of Legal Services prior to using NR 1.95 as the primary basis for taking an enforcement action against a municipality.
4. **Summary of Requirements for Municipalities under Chapter Trans 207:** The following is a brief listing of requirements that municipalities must meet under Chapter Trans 207. This list is probably not all-inclusive but does contain most of the important standards which could be the basis of an enforcement action.
- a. **Trans 207.01 Purpose:** The "purpose" section shows the intentions of the agency which developed the rule and, therefore, should influence the interpretation of other standards included in the rule. The "purpose" section of Trans 207 contains a number of statements regarding the limitations on "constructing authorities" (the local units of government which are covered by this rule). For example, Trans 207.01(6) states that new and replacement bridges "shall minimize alteration of critical features of water habitats."
 - b. **Trans 207.03(1):** Constructing authorities are required to certify compliance with the

requirements of Chapter Trans 207 prior to executing construction contracts or work orders.

- c. Trans 207.05, Requirements of a conceptual plan: Municipalities must provide conceptual plans which meet the requirements of this section. For "minor replacements," the plan requirements are spelled out in Trans 207.05(1) and amplified by the definition of "minor replacement" in Trans 207.04(10). The requirements for other bridge projects are spelled out in Trans 207.05(2).
- d. Trans 207.06, Required navigational clearance: Municipal bridges must meet the same requirements as private bridges under Chapter NR 320, Wisconsin Administrative Code.
- e. Trans 207.07, Flood flow requirements: Municipal bridges must comply with Chapter NR 116, Wisconsin Administrative Code, and with any applicable local floodplain or other zoning ordinance.
- f. Trans 207.08, Waterway alterations: The rule states that permits would still be necessary for stream straightening and dredging activities under sections 30.195 and 30.20, Statutes. An exception is made for minor excavation in the stream bed in order to place structural elements.
- g. Trans 207.09, Erosion control: This section contains a variety of erosion control measures which are required for municipal bridge construction. The extent of these measures varies depending on whether they are to be placed within the "active stream erosion zone" or outside of that area. The rule specifically references the Department of Transportation "Green Book" (the "Standard Specifications for Road and Bridge Construction"). In addition, the rule contains requirements for embankment slopes and erosion control measures such as vegetative cover and riprap. This section also makes specific references to road overflow sections and to roadside and cross-road drainage ditches.
- h. Trans 207.10, Construction methods: General requirements are included here on temporary navigation clearance, temporary water opening to convey flood flow, temporary erosion control, timing of construction to avoid adverse environmental effects, the removal of old structures no longer used for highway purposes, and the excavation and disposal of unsuitable embankment and foundation material. Please note that in the case of disposal of embankment or demolition material the requirement for one time solid waste disposal approval would still hold since it is not excluded by either Trans 207 or the basic statutes.
- i. Trans 207. 11, Notification to Department of Natural Resources: Municipalities are required to provide adequate notice to the Department on proposed projects. As indicated before, there is no emergency provision allowing construction to proceed without notification. The most critical part of the rule is the requirement in Trans 207.11(2) that if the Department notes "environmental concerns," "constructing authorities shall examine such concerns and act in such a manner as to prevent undue impairment of public rights in navigable waters." This is the primary standard in the rule on which to base any enforcement action as a result of environmental damage (as opposed to specific violations other Trans 207 standards). We should consider the threshold at which "undue impairment of public rights" occurs to be the same threshold that we would apply to "violation of public rights," "injury to public rights," or

"detrimental to the public interest" which are criteria found in other statutes in Chapters 30 and 31. You should recognize that this standard contains no statement about balancing the public benefit from the proposed waterway crossing against the likely harm to public rights that would result. This type of balancing test is not in the rule because the basic statute, setting up the bridge standards, section 84.01(23), does not contain such a test.

- j. Trans 207.12, Public notices: This section contains a requirement that a Class I legal notice be published by the municipality for new bridges and certain replacement bridges. Notice is not required for minor replacements.

- 5. Effect of Chapter Trans 207 on Other Regulations: As noted above, the basic statute (section 30.123) eliminates the requirement for permits for municipal bridges under sections 30.10, 30.12 and 31.23. Neither the basic statutes nor Chapter Trans 207 eliminate any other permit requirements at the state, federal, or local level. Therefore, municipal bridges must comply with applicable local zoning and must meet Department of the Army Section 10 and Section 404 and U.S. Coast Guard permit requirements. Also, as noted above, the requirement for water quality certification is still in effect. This may be particularly helpful in situations where a municipality refuses to accept our recommendations and intends to proceed in a manner that will adversely affect water quality.
- 6. Role of the Wisconsin Department of Transportation: As stated previously, while DOT was primarily responsible for development of Chapter Trans 207, it will not be directly involved in enforcement or other procedures under the rule. The only direct reference to DOT in the rule is a statement that copies of the standard specifications for highway construction are available at DOT offices.

However, we will expect support from DOT if municipalities show a pattern of failure to comply with the rule. In particular, if modifications of Trans 207 become necessary, we would have to accomplish these changes through DOT. It is vital that field staff document through narratives and photographs local noncompliance with the regulations. It should also be pointed out that DOT is the respondent in the current law suit regarding Trans 207 which was filed by the Public Intervenor and Trout Unlimited.

- 7. Publicity on Trans 207 Requirements: The Bureau of Water Regulation and Zoning will take the lead in developing appropriate public information on Trans 207. Information on the rule has been published in a recent newsletter of the Wisconsin County Boards Association. The Bureau will develop letters to be sent to the County Boards Association, county and local zoning officials, the Wisconsin Towns Association, the Alliance of Cities, and the League of Municipalities. Furthermore, the Bureau will develop a news release for use by District staff to inform the public.
- 8. Summary: As you can tell from this lengthy memorandum, there are a number of requirements which all of us should become familiar with so that we can properly and effectively administer Trans 207. While most 1981 municipal highway bridge projects have been planned prior to the effective date of the rule, we can expect a substantial number of requests for review of conceptual plans for projects to be constructed during 1982. We should make every effort to cooperate with the various municipalities to make this rule work to protect public rights in navigable waters while preventing unnecessary delay in bridge construction due to lengthy permit processes. We have made it clear that the municipalities have the opportunity to show that they can act responsibly without a formal permit system. We will make every reasonable effort to assist them to do so.

Please inform all law enforcement, water regulation and zoning, fish management, and wildlife personnel of these requirements. Questions about our administration of Chapter Trans 207 should be referred to Bob Roden at 608-266-8034.

GEM:RWR:SLE

Attach.

cc: C. D. Besadny - ADM/5
Andrew Damon - ADM/5
Linda Bochert - ADM/5
Division Administrators
Jim Kurtz - LEG/5
Stan Druckenmiller - EI/3
Bob Baker - Department of Transportation
R. Roden, L. Larson, R. Knitter - WRZ/5

0804I

[Municipal Bridge Log Sheet Appeared Here]

CORRESPONDENCE/ MEMORANDUM**STATE OF WISCONSIN**

DATE: March 16, 1982

FILE REF: 3560-3

TO: District Directors
Ed Brick - WRZ/5
Dick Knitter - WRZ/5
Larry Larson - WRZ/5

FROM: Robert Roden - WRZ/5

SUBJECT: Program Guidance, Chapter Trans 207, Wis. Adm. Code

Several questions have arisen regarding procedures under Chapter Trans 207, Wis. Adm. Code. This memo is meant to augment or capsule George Meyer's memo on the subject dated September 11, 1981.

A brief summary of the situation leading to the questions is provided for informational purposes. The City of Milwaukee proposes to replace the 11th St. swing bridge over the Burnham Canal with a stationary bridge. The project is not a DOT activity under s. 30.12(4), Stats. The Burnham Canal is an enlargement of the Menomonee River about a mile upstream of its mouth at Lark Michigan. The Southeast District office has been contacted by the attorney of upstream owner who complains that the replacement bridge will severely affect his client's shipping capability. The owner's current shipping practice requires rotation of the swing bridge to allow passage of vessels. The proposed replacement bridge would have the same clearance as the swing bridge in the closed position, but that clearance would be inadequate for the upstream owner.

Question 1. Does Trans 207 apply to this situation?

Since the canal is an enlargement of a stream, it should be considered part of the stream and Trans 207 requirements would apply.

Question 2. What authority would we have if Trans 207 did not apply?

If the canal was not considered part of the stream, Trans 207 would not apply. Permits or approvals would be required. The exemption from permits under s. 30.123, Stats., is conditioned upon compliance with standards developed pursuant to s. 84.01(23), Stats., and the standards (Trans 207) were developed only for stream crossings. This position is further supported by the language of s. 30.10(4)(a), Stats., "This section does not impair the powers granted by law under s. 30.123 or by other law to municipalities to construct highway bridges, arches or culverts over streams."

Question 3. If a municipality fails to comply with Trans 207, for stream crossing, can we require that they apply for permits?

The exemption from permits under s. 30.123, Stats., would still apply. Although we could not require permits, we could initiate enforcement actions to secure compliance with Trans 207 requirements, which is mandated by s. 30.123, Stats.

Question 4. When can we initiate enforcement actions? What mechanisms are available for enforcement?

While the following enforcement procedures may be initiated by DNR, as appropriate, it is suggested that municipalities be given the opportunity to take corrective action voluntarily prior to initiating an enforcement action.

If in the review process under Trans 207. 11 we have sufficient reason to conclude that the proposal will not conform to the requirements of the rule, and we are unable to resolve the problem with the municipality, we may immediately initiate enforcement proceedings under s. 30.03, Stats., even before construction has begun. For the case described, failure of the municipality to provide adequate navigational clearance would violate the provisions of Trans 207.06 and hence would be a violation of s. 30.123, Stats. (See Trans 207.13 and the note following it.)

If in the course of construction the municipality fails to comply with the requirements of Trans 207 or violates some other provision of law, appropriate enforcement actions may be initiated under ss. 29.29(3) or 30.03, Stats.

If immediate action is necessary to prevent "undue impairment of public rights," we may ask the Department of Justice or the District Attorney to seek a temporary restraining order halting the project.

If we become aware of construction which has proceeded where the municipality failed to notify us pursuant to Tans 207. 11, and the requirements of the rule have not been met, enforcement actions may be initiated pursuant to ss. 30.03 or 30.15, Stats. Generally, such enforcement actions should only be considered if the project has adversely affected public rights or interests, or if the municipality has consistently failed to meet the procedural requirements of Trans 207.

Question 5. Trans 207 requires the municipality to publish a public notice under certain circumstances. When should the notice be published and what information should it contain?

Although the public notice can come out at any time, it would be preferable that the notice be issued after Department concurrence on the conceptual plan for the structure. Hopefully, any potential problems with a structure should be worked out between the municipality and the Department prior to public notice.

Trans 207.12(1) requires publication of a Class I legal notice "if the proposed structure is a new structure, or will be a reduction of existing navigation clearance, or is a replacement of an existing structure which is in itself the limiting obstruction. " It further requires that public notices be posted in "conspicuous locations in the locality of the proposed structure. " There are no provisions for public hearing in response to the notice. Although we probably can't require it, we should suggest to the municipality that a basic description of the proposed project be provided and that riparian owners who might be affected receive a copy of the notice.

Question 6. Trans 207.03 requires a certification that design and construction of a structure will comply with the requirements of the rule. Who does the certification go to and what value does it have?

The rule does not specify that the certification should be provided to anyone. However, the "Order Adopting Rule" which was sent by Bob Roden to all District WMC's may provide some additional guidance. Item number 2 of the D.O.T. analysis says that "Certification of adherence to the rules is to be provided by the constructing authority. " The fiscal estimate indicates that the effect of the rule is to "shift responsibility from a permitting procedure to a compliance certification..." These two statements would seem to imply that the certifications should be provided to the DNR. However, requiring certifications from municipalities who normally meet

Trans 207 requirements may prove to be an irritant which might jeopardize otherwise good working relationships. It is recommended that we request the certifications only where we feel that Trans 207 requirements are not being met. We should remind all municipalities of the certification requirement, however, to assist them in complying with Trans 207.

Since the certification procedure was adopted to eliminate the need for municipalities to secure permits for stream crossings, presumably the certification procedure is a means of evaluating whether municipalities are acting in a responsible manner. If Trans 207 procedures are not adequately protecting public rights or interests it may be necessary for the DNR to seek more effective controls.

RR:BS:JKB

cc: George Meyer - ADM/5
Jim Chizek - LE/5
Mike Cain - LEG/5

2047H

CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

August 23, 1983
(WMC)

FILE REF: 3550

District Directors

PMMS Response
Put in: Chapter 80, Water Regulation Handbook

Robert W. Roden

Distribution: All Program Staff

DNR Policy Regarding Existing Bridges and Culverts Upon Abandonment of a Railroad Line

Attached is a letter from George E. Meyer to Frank Tippy of the Chicago and Northwestern Transportation Company. The letter sets forth our policy regarding existing bridges and culverts upon abandonment of a railroad line. This subject is discussed in Chapter 80, the bridge chapter of the Water Regulation Handbook with regard to authority for construction of bridges.

Reviewed By: Michael Cain
Scott Hausmann
Dan Holzman

EB:msg/0601D

Attach.

June 27, 1983
NC-0-1274

IN REPLY REFER TO: 3560-3

Mr. Frank Tippy
Chicago and Northwestern Transportation Company
165 N. Canal Street
Chicago, IL 60606

Dear Mr. Tippy:

You have asked for an explanation of the Department's policy regarding existing bridges and culverts upon abandonment of a railroad line. It is our position that the law requires that the present owner remove bridges and culverts across navigable waters or that the future owner secure authority from the Department to maintain those structures.

While the original franchise issued by the Legislature for railroad construction did authorize the bridges and culverts, when a railroad abandons a line, authority to maintain the line and the structure ceases. At that point in time, the bridges and culverts must either be removed or reauthorized. The Department may reauthorize bridges or culverts through issuance of appropriate permits or approvals to the future owner of the lands comprising the former railroad right-of-way. We feel that the final disposition of the structures must be addressed prior to approval of a railroad abandonment. In some cases a future railroad right-of-way owner may not wish to maintain a structure or be able to obtain the appropriate permit or approval. In those situations we believe it is the railroad's responsibility to remove the structures.

Even before railroads were constructed in Wisconsin, the statutes and common law prohibited obstructions over navigable waters unless authorized by the Legislature. Currently, unauthorized bridges and culverts are prohibited by ss. 30.10, 30.12, 30.15 and 31.23, Wis. Stats., and their maintenance may be abated through legal action under the appropriate statute or s. 31.25 (copies attached).

You or other members of the Chicago and Northwestern Transportation Company may feel free to contact me for any further clarification or explanation of this policy. In the meantime, I hope that you will continue to cooperate with our field staff in their dealings with you on current abandonment proceedings.

Sincerely,
Division of Enforcement

George E. Meyer
Administrator

cc: John Brasch - Rhinelander
James Kurtz - LEG/5
Robert W. Roden - WRZ/5
Howard Druckenmiller - EI/3
D. K. Tyler - Woodruff
Jim Smith - DOT

24221

CORRESPONDENCE/ MEMORANDUM**STATE OF WISCONSIN**

DATE: April 16, 1984

FILE REF: 3560

PMMS Response

Put In: Chapter 80, WR Handbook

Distribution: All Program Staff

TO: District Directors

FROM: Robert W. Roden - WRZ/5

SUBJECT: Program Guidance - Water Quality Certification for Department of Transportation Highway and Bridge Projects

I recently became aware that program staff have been routinely waiving the right to certify that Department of Transportation bridge and highway projects are in compliance with the requirements of section 401a of the Clean Water Act.

Subsection NR 299.01(2)(c) states that a waiver of certification is only appropriate where there is no discharge into waters of the state or where an activity is not within the purview of the Department's authority. Because sections 30.12(4), 84.11(7) and 84.12(7), Stats., clearly specify that the Department has authority which can be exercised in relation to DOT highway and bridge projects, a waiver of water quality certification should only occur when there is no discharge to waters of the state.

Proper action on water quality certification requests for DOT projects is therefore limited to the following:

1. Grant of water quality certification: project meets substantive requirements of NR 299.05(1)(b) with no conditions necessary.
2. Conditional grant of certification: project meets substantive requirements of NR 299.05(1)(b) if conditions agreed to in the liaison process are met.
3. Denial of certification: project does not meet substantive requirements of NR 299.05(1)(b) because satisfactory agreement could not be reached with DOT in the liaison process.
4. Waiver of right to certify: project does not involve discharge into waters of the state.

You should note that subsection NR 299.05(1)(b)7 refers to "any other appropriate requirements of state law as provided in 33 U.S.C. s. 1341(d)". For our purposes, you should consider the full range of substantive laws and regulations referenced in section 30.12(4)(a) as "other appropriate requirements of state law" under this subsection where DOT projects are involved. Please note that DOT is exempt from complying with local shoreland-wetland zoning provided the liaison process is satisfactorily completed.

However, you should also keep in mind that these issues should have been dealt with during the liaison process and that new concerns should not ordinarily be raised under 401 certification. Instead, 401 certification should be looked on as a formalization of agreements reached under the DNR-DOT Cooperative Agreement.

Since section 30.12(4) provides different procedures to be followed from those specified in the referenced statutes, no public notice is required under ch. NR 299 and the appropriate language regarding water quality

certification should instead be included in the public notice issued by the Corps of Engineers.

Reviewed By:

George Meyer

Jim Kurtz

Stan Druckenmiller

RYirR:sm

cc: Kathy Curtner - ADM/5

Lyman Wible - ADM/5

Bruce Baker - WRM/2

Jim Kurtz - LEG/5

Stan Druckenmiller - EI/3

Mike Cain - LEG/5

Scott Hausmann - WRZ/5

Larry Larson - WRZ/5

4903K

CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

Date: February 16, 1987

File Ref: 3500

To: Dale Lang – NCD

PMMS RESPONSE

PUT IN: Chapter 80, Water Regulation Handbook

From: Scott Hausman – WZ

DISTRIBUTION: All Program Staff

Subject: Evaluation of ss. 30.18 Permits, Rights of Downstream Wastewater Dischargers

You have asked how do we account for the needs of downstream wastewater dischargers when evaluating a diversion permit.

Section 30.18(4)(a) established the department's noticing requirements for diversions authorized pursuant to section 30.18(2) in conjunction with the requirements of section 31.06. These noticing requirements are essentially the same as before with exception to the addition of persons specified in 144.026(5)(b) or (6)(f), if applicable.

Pursuant to the provisions of section 30.18(5)(a) the department shall approve an application for a permit required under sub. (2)(a) if the department determines both of the following:

1. That the proposed diversion will not injure any public rights in navigable waters.
2. That the water to be diverted is surplus water; or it is not surplus water that all riparians who may be adversely affected by the diversion have consented to the proposed diversion.

Because this section requires the department to determine whether or not items 1 and 2 are complied with, then we must make a determination whether or not the water being diverted is surplus or nonsurplus and make a determination as to whether or not riparians may be adversely affected.

Our determination of surplus vs. nonsurplus water in conjunction with a public interest stage should consider existing WPDES permit holders and the flow requirements upon which their minimum discharge standards are established. It is likely that other instream flow concerns such as fish habitat, navigation, recreation, etc., will, more often than not, have a higher minimum flow requirement to prevent injury to public rights than the minimum flow requirement for effluent limitations. You should also note that the quality of water for public use is considered a public right. WPDES permit holders are considered beneficial users of a stream and would have to consent to a diversion if nonsurplus water would be diverted.

We should follow similar procedures as we have in the past.

SH:DS:el

CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

DATE: April 5, 1988 IN REPLY REFER TO: 3550

TO: District Directors (WMC)

PMMS Response

Insertion: Chapters 80 & 150 Water Regulation Handbook

FROM: Scott Hausmann - WZ/6

Distribution: WRZ Program Staff

SUBJECT: Removal of Unauthorized Structures

We have been asked questions regarding removal of unauthorized structures for the following two scenarios:

1. A private driveway bridge which has a significant backwater effect to a lake was constructed in the 1960's without any record of authorization.

Q: Can the Department order upsizing of the bridge's conveyance capacity using NR 320.07(1) Standards?

A: Past practice up to 1974 was that even though many bridges were constructed in apparent violation of the statutes, the Department and its predecessor agencies usually took enforcement action only on bridges which were believed to obstruct navigation. With the establishment of NR 320 in 1976 the Department was required to commence an enforcement investigation upon receipt of a written complaint for any private bridge in existence on January 1, 1977 which has not received a necessary permit or approval.

After such investigation, the Department shall, if it finds that the bridge causes environmental damage, floodflow or navigational problems, seek voluntary compliance in modifying the bridge through a written request. If the owner fails to bring the bridge into compliance, the Department shall then commence an enforcement action.

Consideration should be given to the issuance of an order to upgrade the bridge's conveyance capacity only if a strong case can be made that the backwater caused by the bridge is an obstruction to navigation or is causing environmental damage. Considerable weight should also be given to the amount of time that has elapsed without complaints being filed or enforcement actions by the Department.

2. Unauthorized dams were constructed on Milwaukee River tributaries at some unknown time in the past. Fish management has identified that they are having a negative water quality and fish habitat effect. Through the Milwaukee River Program they have identified removal of the dams as a key management strategy for the particular stream.

Q: What mechanisms should be used to obtain their removal?

A: Initial steps which should be taken in this matter should consist of, a) Attempt to determine ownership; b) Research the original authorization or lack thereof, and c) Seek voluntary removal or modification of structure.

If this doesn't work then we can follow procedures identified under s. 31.253 Wis. Stats. These procedures involve conducting a public informational hearing or publishing a Class 2 notice stating we

will seek or cause removal of the dam without a public informational hearing if one is not requested within 30 days. Upon completion of the public informational hearing or 30 day notice period as the case may be, an order may be issued for removal of the dam. Such order shall include appeal rights and if so appealed may result in the need for a contested case hearing pursuant to s. 227.42 Wis. Stats. If the owner does not comply with the removal order, citations may be issued and the matter further pursued through the local District Attorneys office. If cooperation and compliance cannot be obtained through the District Attorney's office, it may be necessary to refer the matter to the Attorney General's office for enforcement under s. 30.03 Wis. Stats.

If we can't find an owner, we can use 31.187 for abandoned dams.

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CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

DATE: December 9, 1988 IN REPLY REFER TO: 3550

TO: District Directors (WMC)

PMMS Response

Insertion: Ch.3-Floodplain/Shoreland Guidebook
Ch. 80-Water Regulation Handbook

FROM: Bob Roden - WZ/6

Distribution: WRZ Program Staff
County Zoning Administrators
Municipal Zoning Administrators

SUBJECT: Analysis of Projects in the Floodway

This guidance applies to any encroachment into a floodway, including Ch 30 permit actions and all state and local highway projects. It resulted from recent discussions with Water Regulation and Zoning Program staff, and recent amendments to the DOT/DNR Cooperative Agreement. The following questions have been raised:

Question #1. Should projects be analyzed for compliance with Wis. Adm. Code NR 116 by the equal degree or by the single degree methodology?

Answer: The February 1986 version of NR 116 requires that all proposed projects in the floodway must be analyzed based on the obstruction to floodflow caused by the project (single degree of hydraulic encroachment). The threshold for further action based on the analysis of the project is 0.01 foot increase in the 100 year profile.

However, many local floodplain ordinances still refer to the previous version of NR 116 which required the "equal degree" methodology and the threshold of 0.1 feet. If the local ordinance has not been updated to comply with the current standards in NR 116, analysis of proposed projects in the floodway must be done in accordance with the local ordinance.

Equal Degree Methodology

An obstruction proposed in the floodway must be analyzed so that all property owners within a hydraulic reach, on both sides of the river, have the same opportunity to develop. This "equal right of encroachment" is the basis for the original concept of the equal degree methodology. A "hydraulic reach" is defined in the 1977 version of NR 116 as a "significant change in the hydraulic character of the river". It is not simply the distance between two cross sections.

Proposed bridge projects are the most difficult kinds of projects to be analyzed by the equal degree concept. It becomes even more difficult to consistently apply this methodology to replacement bridge structures. This is especially true when the obstruction caused by the existing structure (because of the approach grades) may not be altered significantly by replacing the structure itself.

For bridge structures the equal degree concept is correctly applied by a percent conveyance reduction on each side of the stream that will "represent" the new approach grade and bridge structure together. This should be applied for each cross section in the analysis for a "hydraulic

reach". If the results of this analysis is equal to or greater than 0.1 feet, amendments to the local ordinances will be required and legal arrangements must be obtained from all affected property owners.

Single Degree Methodology

For communities with updated ordinances (1986 version of NR 116) the single degree methodology is appropriate. This methodology is a comparatively simple process because only the actual physical obstruction or additional obstruction (in the case of replacement structures) will be represented on the cross sectional data input. If the analysis determines that the proposed project will cause an increase in floodstage equal to or greater than 0.01 feet, the local ordinance must be amended after legal arrangements have been obtained from all affected property owners. Before this approach can be used in analyzing proposed projects in the floodway the community ordinance must reflect the current standards in NR 116.

Question #2. When are hydraulic and hydrologic calculations necessary for an amendment to local ordinances?

Answer: Calculations are necessary when a project will cause an obstruction to flood flows. The following apply to various "mapped/studied" floodplain areas:

1. Mapped and studied floodplain: An analysis must be done because the area is fully regulated by a zoning ordinance. If the proposed project causes an increase to the adopted flood profile, legal arrangements and an amendment to the local ordinance are necessary.
2. Mapped but not studied floodplain: An analysis of the project must be performed as outlined above. We will require an amendment to the zoning ordinance to recognize the calculated floodplain elevations (proposed). If the project will cause an increase to the regional flood profile, legal arrangements must be obtained from all property owners, before an amendment can be approved.
3. Unmapped but studied floodplain: We should treat these the same as mapped and studied areas. A new analysis should be done so that the correct data can be mapped and then provided to the community. Construction can proceed before the community adopts the data.

Question #3. What is DNR policy for situations where the calculated flood elevation for proposed projects does not match published (adopted) detailed studies?

Answer: The starting point for analysis of projects must be the adopted study. If an analysis for a proposed project for the existing (pre-project) condition does not match the adopted 100-year flood elevation for existing conditions, then the new analysis must be approved by DNR. If this is not done, there may be an inconsistency in how the local ordinance is administered because different standards of technical sufficiency for analyses may have been applied.

Often a case by case analysis for a proposed project will be done long after completion of the adopted floodplain study for a particular community. If the results of the analysis do not match the study, then the adopted floodplain study should be considered for revision. However, the analysis of proposed projects must be done to the same level of accuracy as the adopted study for a valid comparison. For example, if the HEC-2 computer program has been used in the adopted study, then the analysis of the proposed project must be done using the original study data in HEC-2 format. If the hydrologic analysis for the estimate of peak discharge is different from that of the adopted study, then the entire study throughout the community is in question. The only valid method to determine the most accurate study is for the new analysis to be done as thoroughly as

the original study. An example is where the "adopted" peak discharge had been analyzed on a watershed basis and applied to the study for the community. In this case the new analysis must be done on a watershed basis as opposed to estimates developed for one site only. The importance of this issue is reflected in the requirement that information submitted for the analysis will be transmitted to the community by the DNR for amendment to the local ordinance.

Related Guidance: February 1, 1982 "Chapter 30/31 Permit Actions"

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